

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

COMPETITIVE ENTERPRISE INSTITUTE)
1899 L Street, N.W., 12th Floor)
Washington, D.C. 20036)

Plaintiff,)

v.)

Civil Action No. 13-

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY)
1200 Pennsylvania Avenue, N.W.)
Washington, D.C. 20460)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff COMPETITIVE ENTERPRISE INSTITUTE (“CEI”) for its complaint against Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (“EPA” or “the Agency”), alleges as follows:

- 1) This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel production under a FOIA request seeking certain EPA text message transcripts (“texts” or “text messages”).
- 2) On April 26, 2013, CEI submitted its request seeking those records, all of which which were created on an EPA-assigned personal digital assistant or personal data assistant (PDA), and sent or received by a senior EPA official, Assistant Administrator for Air and Radiation Gina McCarthy, on eighteen specified dates.
- 3) Defendant EPA has provided neither responsive records nor the substantive response required by statute.

- 4) Text messaging is used as an alternative medium of communication to electronic mail (email), and texting accounts are specifically provided to certain officials for the purpose of enabling performance of particular official functions.
- 5) These texts are “agency records” under federal record-keeping and disclosure laws. They are of significant public interest, especially due to EPA’s recurrent failure to produce text message transcripts in response to FOIA and congressional oversight requests.
- 6) Plaintiff CEI states on information and belief that Ms. McCarthy regularly used text messaging as an alternative to email for work-related communications, and that a senior Agency official cautioned McCarthy to cease using that function on her PDA, due to concerns about the propriety of her texting about Members of Congress specifically on days when she testified before either the House or Senate.
- 7) Compelling EPA to respond, whether by releasing responsive records, or issuing a “no records” response, will shed light on EPA’s recordkeeping practices and compliance with its legal obligations. Specifically, this will inform the public about why EPA has failed to produce this class of records in response to requests clearly seeking them, by indicating whether EPA has been preserving this class of records as required by law but simply not turning them over, or whether it is failing to preserve (*i.e.*, destroying) them, in violation of law and policy.
- 8) Since the text messages at issue were sent to and from the current nominee to be EPA’s new administrator (who was specifically charged by EPA with responsibility for ensuring its Air Office’s compliance with applicable recordkeeping law and

policy), these records, and whether Ms. McCarthy fulfilled her obligation to maintain and to produce them, are of significant public interest.

- 9) Despite this, and in the face of revelations about organized and systemic abuses by senior federal employees to hide from the public their activities, particularly their electronic communications, EPA has failed to provide the required response.

Accordingly, Plaintiff files this lawsuit to compel EPA to comply with the law.

PARTIES

- 10) Plaintiff CEI is a public policy research and educational institute in Washington, D.C., dedicated to advancing responsible regulation and in particular economically sustainable environmental policy. CEI's programs include research, investigative journalism and publication, as well as a transparency initiative seeking public records relating to environmental policy and how policymakers use public resources.
- 11) Defendant EPA is a federal agency headquartered in Washington, D.C. whose stated mission is to "protect human health and the environment."

JURISDICTION AND VENUE

- 12) This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), because this action is brought in the District of Columbia, and 28 U.S.C. § 1331, because the resolution of disputes under FOIA presents a federal question.
- 13) Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the District of Columbia, and defendant EPA is a federal agency.

FURTHER FACTUAL BACKGROUND

- 14) EPA has not provided any records, or substantive response, to CEI's FOIA request for Assistant Administration McCarthy's text messages. Nor has it sought or made the case for more time to respond, or for more information.
- 15) To date, Defendant EPA has only acknowledged receipt of the request, said it will respond to the request at some unspecified future time, and informed CEI that its request is "non-billable" under FOIA.¹ (Typically, FOIA requests are non-billable when they can be handled in two hours or less. *See* 5 U.S.C. § 552(a)(4)(A)(iv)).
- 16) Through its determination that the FOIA request was non-billable, the EPA effectively conceded that it was able to provide a substantive response to the FOIA request with minimal effort, yet it did not do so.
- 17) Transparency in government is the subject of high-profile vows by the president and attorney general that FOIA will "be administered with a clear presumption: In the face of doubt, openness prevails" (*See* Attorney General Eric Holder, *OIP Guidance, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, Creating a "New Era of Open Government"*, www.justice.gov/oip/foiapost/2009foiapost8.htm; *Memorandum for the Heads of Executive Departments*, www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.)

Plaintiff CEI's FOIA Request HQ-2013-006005 Seeking Certain Specified Text Messages of Gina McCarthy

- 18) On April 26, 2013, CEI submitted a FOIA Request by electronic mail to hq.foia@epa.gov, seeking (emphases in original)²:

¹ See *infra*, ¶ 20.

² This is the email address specified by the government for submission of FOIA requests such as CEI's.

copies of all text messages¹ sent by Assistant Administrator for Air and Radiation Gina McCarthy on a mobile telephone provided for her use by the Agency, on the following eighteen days:

2009: July 9, 2009; July 14, 2009

2010: July 22, 2010; March 4, 2010; March 24, 2010

2011: March 1, 2011; March 13, 2011; March 24, 2011; April 13, 2011; May 13, 2011; June 30, 2011; September 8, 2011; September 15, 2011; October 12, 2011; October 25, 2011

2012: February 28, 2012; June 19, 2012; June 29, 2012.

Defendant's Response to Plaintiff's FOIA Request

- 19) EPA assigned this request identification number EPA-HQ-2013-006005 by letter dated and sent by electronic mail on May 9, 2013.
- 20) This letter stated in pertinent part, "The Office of the Administrator will be responding to your request, your request did not reach the billable amount."³

LEGAL ARGUMENTS

Text Messages are "Agency Records" Under Federal Record-Keeping and Disclosure Laws, and EPA's Implementing Policies

- 21) EPA provides certain employees with PDAs and text messaging capability as an option to email for official or otherwise work-related internal or external communications.
- 22) Text messaging correspondence are agency records and must be maintained and produced as such. *See, e.g.*, National Archives, *Frequently Asked Questions About Instant Messaging*, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html>

³ See May 9, 2013 letter from National FOIA Officer Larry Gottesman to CEI counsel Christopher Horner.

(Instant Messaging (IM) content can “qualify as a Federal Record,” since IM “allows users” to “exchange text messages,” which are “machine readable materials” and thus within the “statutory definition of records”); *Frequent Questions about E-Mail and Records*, <http://www.epa.gov/records/faqs/email.htm>; *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm; *Memo to All Staff, “Transparency at EPA,”* by Acting Administrator Bob Perciasepe, dated April 8, 2013 (“the Inspector General currently is conducting an audit of the agency’s records management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system”).⁴

Defendant EPA Owed and Has Failed to Provide Plaintiff a Meaningful, Productive Response to its Request

23) FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, affirming the agency is processing the request and intends to comply. It must rise to the level of indicating “that the agency is exercising due diligence in responding to the request...Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.” (5 U.S.C. § 552(a)(6)(C)(i)). Alternatively, the agency must cite “exceptional circumstances” and request, and make the case for, an

⁴ See also April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems); *Records and ECMS Briefing, EPA Incoming Political Appointees 2009*, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67.

extension that is necessary and proper to the specific request. *See, e.g., Buc v. FDA*, 762 F.Supp.2d 62, 67-73 (D.D.C. 2011).

- 24) EPA regulations state, *inter alia*, “(a) Unless the Agency and the requester have agreed otherwise, or when unusual circumstances exist as provided in paragraph (e) of this section, EPA offices will respond to requests no later than 20 working days from the date the request is received and logged in by the appropriate FOI Office. EPA will ordinarily respond to requests in the order in which they were received. If EPA fails to respond to your request within the 20 working day period, or any authorized extension of time, you may seek judicial review to obtain the records without first making an administrative appeal.” 40 C.F.R. § 2.104..
- 25) Within 20 working days EPA must at least have informed the requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013)(“CREW”). That information should include an estimated schedule for completion of the production. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221, 227 (D.D.C. 2011) (addressing “the statutory requirement that [agencies] provide estimated dates of completion”).
- 26) FOIA specifically requires EPA to have, by this time, provided CEI with a particularized and substantive determination, including its reasoning, as well as notice of CEI’s right to appeal. *See CREW*, 711 F.3d at 186.
- 27) EPA owed CEI a substantive response to its request by May 24, 2013.

- 28) After acknowledging CEI's request, EPA did not substantively respond, or order production of responsive records, or indicate that a certain quantity of records was being reviewed with an eye toward production on some estimated schedule. Nor has it sought and made its case for an extension of time to respond to the request as required when "exceptional circumstances" exist.

Having Failed to Properly Respond to Plaintiff's Request, Defendant EPA Owes Plaintiff Responsive Records

- 29) In short, EPA has provided no responsive records or substantive response to CEI. Due to this failure to substantively respond to CEI's request, CEI need not administratively appeal, but instead may seek relief from this Court, under well-established precedent.
- 30) Thus, EPA is now legally required to provide CEI records responsive to its request.

FIRST CLAIM FOR RELIEF

Duty to Release Certain Described Text Messages -- Declaratory Judgment

- 31) Plaintiff re-alleges paragraphs 1-30 as if fully set out herein.
- 32) FOIA requires all doubts to be resolved in favor of disclosure. It allows the citizenry to learn "what their government is up to." *NRA v. Favish* 541 U.S. 157, 171 (quoting *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.*
- 33) Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

- 34) Plaintiff has a statutory right to the information it seeks.
- 35) EPA failed to provide Plaintiff responsive records or a substantive response.
- 36) CEI has exhausted its administrative remedies.
- 37) CEI asks this Court to enter a judgment declaring that
 - i. The EPA text message records described in Plaintiff's request No. HQ-2013-006005, and any attachments thereto, are public records, and as such, are subject to release under FOIA;
 - ii. EPA must release those requested records;
 - iii. EPA's denial of CEI's FOIA request is not reasonable, and does not satisfy EPA's obligations under FOIA; and
 - iv. EPA's refusal to produce the requested records is unlawful.

SECOND CLAIM FOR RELIEF

Release of Certain Described Text Messages -- Injunctive Relief

- 38) Plaintiff re-alleges paragraphs 1-37 as if fully set out herein.
- 39) CEI is entitled to injunctive relief compelling EPA to produce all records in its possession responsive to CEI's FOIA request.
- 40) This Court should enter an injunction ordering EPA to produce to CEI within 10 business days of the date of the order, the requested "text" records described in Plaintiff's request No. HQ-2013-006005, and any attachments thereto.

THIRD CLAIM FOR RELIEF

Costs And Fees – Injunctive Relief

- 41) Plaintiff re-alleges paragraphs 1-40 as if fully set out herein.
- 42) Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- 43) This Court should enter an injunction ordering the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

44) CEI has a statutory right to the records that it seeks, EPA has not fulfilled its statutory obligations to provide the records or a substantive response, and there is no legal basis for withholding the records.

WHEREFORE, Plaintiff requests the declaratory and injunctive relief herein sought, and an award for its attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 29th day of May, 2013,



Christopher C. Horner
D.C. Bar No. 440107
1899 L Street, NW, 12th Floor
Washington, D.C. 20036
(202) 262-4458
chris.horner@cei.org



Hans Bader, D.C. Bar No. 466545
Sam Kazman, D.C. Bar No. 946376
Competitive Enterprise Institute
1899 L St., N.W., 12th Floor
Washington, D.C. 20036
(202) 331-2278, hbader@cei.org
Attorneys for Plaintiff